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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 683

SAVON GAS STATIONS NUMBER SIX, INC.
and
A. & H. TRANSPORTATION, INC., *Petitioners*

v.

SHELL OIL COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT SHELL OIL COMPANY IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (Pet. App. 12a-22a)[1] is reported in 203 F. Supp. 529. The opinion of the Court of Appeals (Pet. App. 3a-11a) is reported in 309 F. 2d 306.

[1] The appendix to the petition is cited as "Pet. App." Petitioners' and respondent's appendices in the Court of Appeals are cited as "Savon App." and "Shell App." respectively.

JURISDICTION

The petition for writ of certiorari was filed on December 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondent, Shell Oil Company (Shell), defendant below, filed a motion with the trial court for summary judgment. In granting this motion, the District Court found that there was no genuine issue as to any material fact and concluded that as a matter of law the undisputed facts disclosed neither (1) an unreasonable restraint of trade on interstate commerce, as required by the Sherman Act, nor (2) a cause of action under the common law of Maryland. The Court of Appeals for the Fourth Circuit unanimously affirmed. The sole question presented here is whether the courts below properly sustained Shell's motion.

STATUTE INVOLVED

The pertinent sections of the Sherman Act (15 U.S.C. § 1, *et seq.*) are reproduced in Appendix A of the petition. (Pet. App. 1a-2a)

STATEMENT

This is a private antitrust action. The complaint, filed October 27, 1961, contains two counts. (Savon App. 1-12) Count I alleges that Shell violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2), by agreeing, combining and conspiring with operators of a shopping center to monopolize and restrain trade in commerce in the retail sale of gasoline and other petroleum products. Count II alleges the same

facts as constituting a violation of the common law of the State of Maryland.

Shell, as defendant below, filed a motion for summary judgment. (Savon App. 10-12) In support of this motion, Shell relied upon the complaint and deposition of Harry Waller, the President, chief executive officer and principal stockholder of each of the petitioners. Petitioners took the deposition of H. S. Eustis, Shell's Baltimore Division Manager, and also filed an opposition affidavit by Waller.

There is no dispute as to the facts. The statement of facts in the petition is in some respects argumentative,[2] but the main fault is that it recites facts which are palpably irrelevant while omitting other facts which are essential for the understanding of the action of the courts below. This statement supplies additional factual information which Shell feels will be helpful to the Court.

This case involves two service stations located on or adjacent to the Middlesex Shopping Center, which is located on the northwest side of Eastern Boulevard, southwest of Essex Avenue in Baltimore County, Maryland. (Savon App. 4) The two stations are about 700 feet apart. (See Sketch, p. 6, *infra.*)

On October 13, 1954, Shell entered into a lease with the Middlesex Shopping Center for a portion of the land located in the Shopping Center. (Savon App. 5) The lease required Middlesex to construct a gasoline station for lessee Shell. One of the covenants of the

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[2] The statement also contains several errors of fact, such as the assertion, thrice repeated, that Shell admitted price fixing. (Pet. 7; also 6, 8) These errors need not be corrected here since they concern matters of no real importance for the disposition of the petition.

lease provides that Shell would have an exclusive right to operate a gasoline station in the Shopping Center. This provision, Article IA of the lease, provides in full:

> "Lessor [Middlesex] covenants and agrees that, throughout the term of this lease or any extension thereof, Lessor will not use or permit the use of other property belonging to, acquired, or controlled by Lessor or Lessor's principal stockholders, and situated in the area bounded by Eastern Boulevard, Essex Avenue, and Marlyn Avenue, for the purpose of a gasoline service station, or similar enterprise, which would compete with the business of Shell being conducted on the premises." (203 F. Supp. at 530; see also Shell App. 5)

A service station for Shell was constructed on the leased premises in 1954. (Savon App. 5) Since then, either Shell or a lessee of Shell has operated and sold Shell gasoline and other petroleum products at this location. (See Savon App. 8-9)

Almost two years after Shell obtained its Middlesex lease, petitioner Savon Gas Station Number Six, Inc., on July 23, 1956, acquired a lease on a piece of property at Eastern Boulevard and Selig Avenue. (Savon App. 4) The full length of this property borders on Eastern Boulevard; and the upper portion of the property is adjacent to and abuts on the parking area of the Middlesex Shopping Center. (Savon App. 4; and see map, Shell App. 9)

Shortly thereafter, petitioners built a Savon gas station on this property, designed in such a fashion as to attract motorists from the parking area of the Shopping Center as well as the public highway, Eastern Boulevard. (Savon App. 6-7) The Savon station was open for business on August 31, 1956. (Savon

App. 7) On October 19, 1956, Shell wrote the following letter, the body of which is quoted in full, to its lessor, the owner of Middlesex Shopping Center:

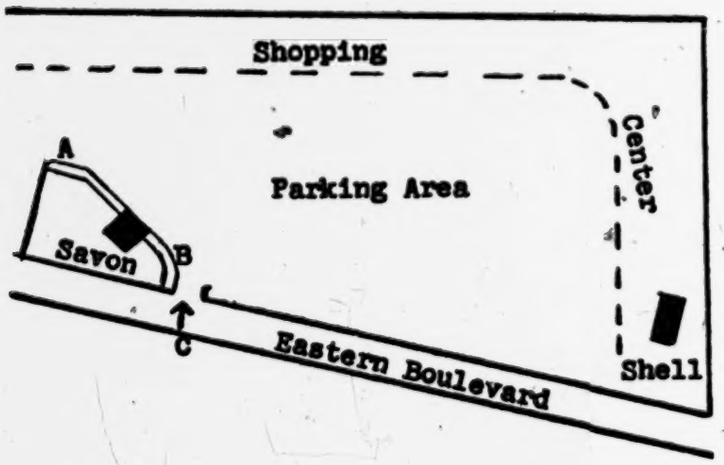
> "Under lease dated October 13, 1954, your predecessor in title and interest, A. G. G. Realty Corp., leased to us certain premises in the Middlesex Shopping Center at Eastern Boulevard and Essex Avenue, Middle River, Maryland. By Article IA of that lease certain restrictions were agreed upon regarding use of other lands in the area for gasoline service station purposes.
>
> "Subsequent thereto, and specifically within the last two months, it has come to our attention that certain of your lands are being used for entrance into a service station built and owned by another oil company.
>
> "It is our impression that willingly permitting such use is violative of the restrictive covenant of Article IA of the lease with us.
>
> "We are sure that it is our mutual desire that this matter be amicably resolved and we trust that you will immediately explore this matter with your attorneys and initiate such action as they suggest will leave you in full conformance with the legal and moral obligations which you have assumed." (Savon App. 66; also 8)

Petitioners stated that the Middlesex Shopping Center, in response to this letter from Shell, erected in 1956 a "barrier" or curb between the parking area of the Shopping Center and the rear area of petitioners' station. (Savon App. 8-9) Petitioners further stated that the barrier prevented automobiles from moving directly between the Shopping Center parking area and the contiguous area at the rear of the Savon station. (*Ibid.*) They acknowledged, however, that motorists at all times were free to and did enter the

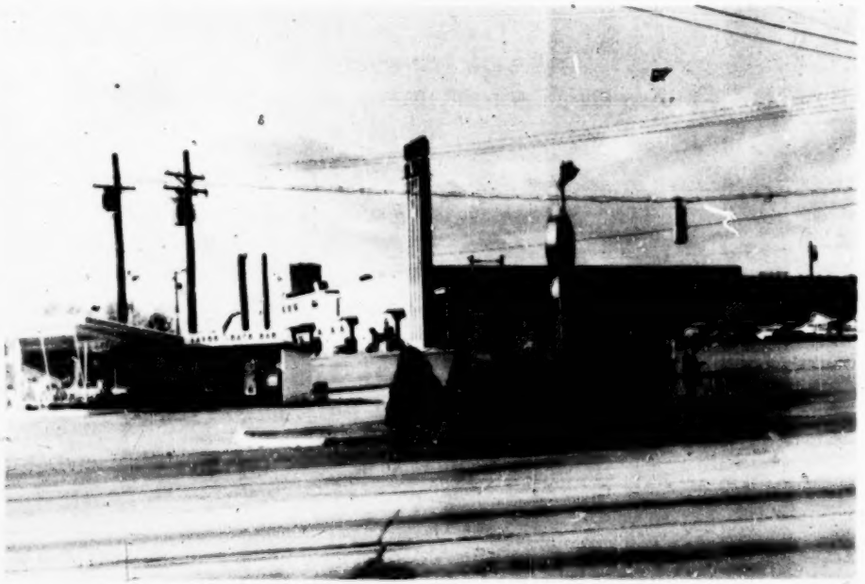
Savon station from the public thoroughfare, Eastern Boulevard. (See Shell App. 7)

Petitioners' whole case is based on the erection of the curb by the Middlesex Shopping Center. There are two basic allegations of the complaint: first, that the exclusive covenant in the Shell lease with the Shopping Center constituted "an unreasonable restraint on trade"; and second, that Shell, in reliance on this covenant, wrote a letter to the Middlesex Shopping Center to which the Shopping Center responded by constructing the curb between its own parking area and the rear area of petitioners' Savon station. (Savon App. 8-9) Relying on these allegations, the complaint charges that Shell violated the Sherman Act and the Maryland common law by restraining and monopolizing the sale of petroleum products in interstate commerce. (Savon App. 1, 9-10)

Because the complaint is based solely on the curb built by the Shopping Center, we set forth below a rough sketch of the Shopping Center showing the location of the Shell and Savon stations.



Defendant's Exhibit No. 5 (Shell App. 11), showing the rear of the Savon station as viewed from the parking area of the Middlesex Shopping Center. This photograph shows the concrete curb that was built by the Middlesex Shopping Center



Defendant's Exhibit No. 2 (Shell App. 10), showing the Savon station and the entrance to the Middlesex Shopping Center as viewed from Eastern Boulevard

It is important to note that petitioners complain only about the curb between the parking area of the Shopping Center and the rear of the Savon station, which is indicated in the sketch by the double lines between A and B. As may be seen from this sketch, motorists using the parking area of the Shopping Center have free access to the Savon gas station through the station driveway located on Eastern Boulevard. The patrons of the Shopping Center need simply drive out of the parking area (see point C on sketch) to enter the Savon station. The ease with which motorists may enter the Savon station driveway may be observed from the sketch above, as well as from the lower photograph (opposite page) of the Shopping Center exit and the Savon station entrance on Eastern Boulevard. In effect, such motorists may be required to travel an extra 50 feet.

The curb merely prevents cars from going directly over the common area between the Shopping Center and the rear of the Savon station. As may be seen from the opposite photographs, the concrete curb is only about six inches high and does not in any way obstruct the view of the Savon station from the parking area of the Shopping Center.

Based on these undisputed facts, the District Court, in a full written opinion (203 F. Supp. 529), granted Shell's motion for summary judgment, holding that as a matter of law the undisputed facts did not disclose either (1) an unreasonable trade restraint on interstate commerce under the Sherman Act or (2) a cause of action under the common law of Maryland. As stated earlier, the Court of Appeals on review unanimously affirmed the action of the District Court.